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RESPONSE TO COMMENTS ON PROPOSED AMENDMENTS TO

310 CMR 75.00: Collection, Recycling, Labeling, and Sales Ban of Mercury Added Products, 310 CMR 70.00: Environmental Results Program Certification, And 310 CMR 4.00: Timely Action Schedule and Fee Provisions

REGULATORY AUTHORITY:
M.G.L. Chapter 21H, Section 6J
As amended by Chapter 196 of the Acts of 2014
M.G.L. Chapter 21A, Section 18

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SUMMARY OF REGULATORY CHANGES

On July 13, 2018, the Massachusetts Department of Environmental Protection (MassDEP or the Department) proposed amendments to the following MassDEP regulations: (1) 310 CMR 75:00: Collection, Recycling, Labeling and Sales Ban of Mercury Added Products; (2) 310 CMR 70.00: Environmental Results Program Certification; and 310 CMR 4:00, Timely Action Schedule and Fee Provisions. MassDEP's regulatory amendments were proposed in order to effectuate the 2014 legislative changes to Massachusetts General Law, Chapter 21H, § 6J, a section of the Mercury Management Act (the Act, M.G.L. c. 21H, §§ 6A-6N). Originally enacted under Chapter 190 of the Acts of 2006, the Mercury Management Act is designed to keep mercury, a toxic metal, out of Massachusetts' trash and wastewater to avoid its release into the environment, where mercury can bio-accumulate in people and wildlife, resulting in serious health consequences. In general, the Mercury Management Act requires manufacturers of mercury-containing products to collect "end of life" products and recycle the mercury. The statute also bans the sale of certain products containing mercury, and establishes specific requirements for mercury switches in vehicles and mercury-added lamps (i.e., light bulbs).

Pursuant to the 2014 legislative revisions to Chapter 21H, Section 6J, manufacturers of mercury-added products, whose products are available for sale in the Commonwealth, must create, file with MassDEP, and implement, a collection plan for mercury-added products at the end-of-life, including a system for the direct return of the mercury-added product to the manufacturer or a collection and recycling plan. Subsection (d)(1) of the revised statute allows manufacturers of mercury-added lamps to satisfy the collection plan requirements via payment of an annual registration fee to the Department to be deposited into a Commonwealth expendable trust. The proposed regulatory change to 310 CMR 4.00 establishes the annual registration fee. The requirement for manufacturers to pay the annual registration fee sunsets on June 30, 2024. Subsection (d)(1) of Section 6J states that the aggregate annual registration fees must total $300,000 and that each individual manufacturer's fee is capped at $10,000. If the aggregate total does not equal $300,000 in a given year, the individual manufacturer's fee may exceed $10,000, pursuant to M.G.L. c. 21A, § 18, MassDEP's authorizing statute for setting fees. The expendable trust fund into which the fees are held will be utilized by MassDEP for "the limited purpose of department and municipal administration, access, communication, enforcement and education costs for proper mercury-added lamp recycling or disposal." M.G.L. c. 21H, § 6J(d)(1).

Pursuant to MassDEP's fee statute and regulations, fees are scaled for various classes of permits to account for differences in the level of effort MassDEP must expend on technical assistance, permit review and ongoing compliance and enforcement activities. In establishing a fee schedule for the Mercury Management Act annual registration fee, MassDEP must adhere to the requirements of both M.G.L. Chapter 21H, § 6J(d)(1) and M.G.L. Chapter 21A, § 18, while not unduly burdening or restricting the ability of manufacturers to do business in Massachusetts. The courts have held that MassDEP's fees must be based upon some fair approximation of the use or privilege. See American Trucking Associations, Inc. et al. v. Sec. of Administration, 415 Mass. 337 (1993).

In 2013, the last year that data was collected for mercury-added products, there were 45 manufacturers that, in the aggregate, sold more than 18 million mercury-added lamps in

Massachusetts that year. Of this total, four manufacturers accounted for 84% of sales, while the combined sales from the other 41 manufacturers required to report under the Mercury Management Act accounted for only 16% of the total sales.

MassDEP is also proposing technical amendments to 310 CMR 70.00: Environmental Results Program Certification, to update the references therein to be consistent with the revised Titles at 310 CMR 75.00 and 310 CMR 75.05.

PUBLIC NOTICE

In accordance with Massachusetts General Law Chapter 30A, MassDEP is required to hold a public hearing and solicit comments on the proposed amendments. On July 13, 2018, MassDEP published notices in the Boston Globe and Springfield Republican announcing the public hearing and public comment period on the proposed amendments. A public hearing was held on August 3, 2018 in Boston, Massachusetts. The comment period closed on August 13, 2018.

RESPONSES TO COMMENTS

This document summarizes and responds to comments that were received during the public comment period. Those who provided oral and/or written comments are listed below:

Name	Organization	Oral Testimony Date	Written Comment Received Date
Mark Kohurst, Director of Environmental Health and Safety	National Electrical Manufacturers Association (NEMA)	8/3/18	
Joseph Eaves, Head (Acting) NEMA Government Relations	National Electrical Manufacturers Association		8/13/18
Anthony W. Serres, LC , Manager, Technical Policy	Signify (formerly Philips Lighting)		8/13/18
Robert A. Rio, Esq. Senior Vice President and Counsel Government Affairs	Associated Industries of Massachusetts		8/11/2018
Elizabeth Saunders, MA Director	Clean Water Action	8/3/18	8/13/18
Joseph Howley, Manager of Industry Relations	General Electric Lighting	8/3/18	
Paul Conca , Operations Manager	Veolia North America Environmental Services	8/3/18	
Jennifer Dolin Manager of Sustainability and Environmental Affairs	LEDVANCE (formerly OSRAM Sylvania),	8/3/18	

1. Comment: (Kohorst and Eaves)

Commenters supported the use of lamp sales as a factor in setting the fee, but because this information is confidential, requested that MassDEP affirm its procedures for maintaining confidentiality. (Kohorst and Eaves)

Response:
MassDEP follows the agency's standard confidentiality procedures as set forth in 310 CMR 3.00 whenever a regulated entity requests confidentiality regarding information that is submitted to the Department. Under those regulations and the state public records act, information may be submitted to MassDEP with a claim of confidentiality, including a claim that the information is confidential business information. Companies may make such confidentiality claims by indicating that intent in their reports and/or other information submitted to the Department. A completed form explaining the rationale for the claim, using the criteria set out in 310 CMR 3.23, should be submitted by the entity along with the report and the information subject to the confidentiality claim. That form is available here: https://www.mass.gov/doc/request-to-maintain-information-confidential-form-0. Information in reports or registrations (such as lamp sales) that is asserted to be confidential, as well as documents MassDEP creates using that information (such as bills), will be separated from the public files and held as confidential until a public records request is made to see that information, whereupon the Department will make a final confidentiality determination pursuant to 310 CMR 3.00. Language to this effect has been added to the regulations.

Confidential information and information subject to a pending confidentiality request is managed by designated staff. Documents are stored in a locked safe, and computer files are kept in secure files. Access to these files and documents is limited to designated staff.

2. Comment: (Kohorst and Eaves)

The commenters seek clarification regarding the date the first certifications will be due.

Response:
The certifications will be due 30 days following promulgation of the regulations.

3. Comment: (Kohorst, Eaves, and Serres)

The commenters seek clarification on whether a retailer that owns the production of lamps sold in the Commonwealth under a particular brand name is liable to pay the registration fee, and want MassDEP to clarify whether some retailers might meet the definition of manufacturer.

Response:
The amendments to 310 CMR 75.00 described in this document do not change the definition of "manufacturer" in the original Mercury Management Act statute (Chapter 190 of the Acts of 2006) and included in the existing version of the regulations. The regulations include the following definition of "manufacturer":

"*75.02 : Definitions …*<u>*Manufacturer*</u> *means any person, firm, association, partnership, corporation, governmental entity, organization, combination or joint venture which produces a product containing mercury or an importer or domestic distributor of a product containing mercury produced in a foreign country. In the case of a mercury-added multi-component product where the only mercury is contained in a mercury-added component manufactured by a different manufacturer which is intended to be readily removable and replaceable by the consumer or user, the manufacturer is the manufacturer who produced the mercury-added component. If the product or component is produced in a foreign country, the manufacturer is the importer or domestic distributor. However, if a company from whom an importer purchases the merchandise has a United States presence or assets, that company shall be considered to be the manufacturer. .."*

Based on this definition:

- Retail companies that purchase lamps from a manufacturer located in the United States would not be considered the manufacturer even if they put their name on the lamps,
- If a company purchased lamps manufactured in a foreign country from an importer or distributor, the importer or distributor would be considered the manufacturer and would be responsible for the annual registration and fee,
- If a United States retailer or other company contracted with a foreign entity to purchase lamps manufactured in a foreign country
    - The United States company would be considered the manufacturer, and would be required to submit the annual registration, provided the foreign company had no United States presence or assets,
    - The foreign company would be considered the manufacturer and would be responsible for the annual registration if it had a United States presence or assets.

MassDEP will make this information clear on its website and in guidance.

4. Comment: (Conca)

The commenter was concerned about the requirement that qualified mercury lamp recyclers provide a recycling certificate to the generators of the lamps because the lamps are typically delivered by a third party.

Response:
The regulations require that the certificates be provided to the person that delivers the lamps for recycling. This is typically the third party that collects the bulbs. Existing invoices should suffice and MassDEP will work with the lamp disposal facilities to develop an acceptable format.

5. Comment: (Conca)

The commenter was concerned about the requirement that qualified mercury lamp recyclers report on the number of broken lamps received. He stated that it would only be possible to develop an estimate of this number because of the form and condition of broken lamps upon delivery.

Response:
An estimate is sufficient and the regulations have been changed to reflect that recyclers must report an estimate of the number of broken bulbs, the basis of that estimate, and the amount of mercury contained therein.

6. Comment: (Saunders)

This commenter outlined the hazards of uncontrolled mercury to fetuses, children and pregnant women and emphasized the importance of the regulations. The commenter expressed concern over the delay between the passage of the revised statute and promulgation of the proposed regulations.

The commenter stated that the proposed lamps regulations are a fair and accurate expression of the law because:

- Fee calculation has a strategy to ensure that the full $300,000 is collected; and
- The fees are equitable because the activities for which they will be used (i.e., Department and municipal administration, access, communication, enforcement and education costs for proper mercury-added lamp recycling or disposal) are only necessary because there are a significant number of mercury added lamps in use in the Commonwealth. If there were not manufacturers whose lamps were being sold in the Commonwealth in large numbers, there would be no need for MassDEP or municipalities to expend resources to ensure safe collection.

Response:
MassDEP appreciates the commenter's support for the regulation.

7. Comment: (Kohorst and Eaves, supported by Howley, Dolin, Serres)

The commenters supported the 2014 statutory amendments that established registration fees. NEMA is also pleased that the proposed regulations use current sales data, obtained through an annual report from each manufacturer of mercury-added lamps sold in Massachusetts the previous calendar year.

Response:
MassDEP appreciates the commenter's support for the regulation.

8. Comment: (Kohorst and Eaves, supported by Howley, Dolin, Serres)

The Chapter 21H, § 6J revised statute stipulates that the revenue from fees collected under the act be used for activities which are unrelated to the number of lamps sold or recycled by individual manufacturers. If fees were designated to pay for the actual cost of collecting and recycling of lamps, it would make sense to correlate each company's fee with reported sales data.

Response:
Section 6J requires that manufacturers of mercury-added products being offered for sale in Massachusetts create and implement plans for collecting and recycling those products. The Act holds each manufacturer financially responsible for the collection and recycling systems required under the Act. The Act also allows manufacturers the optional alternative of paying an annual registration fee in order to satisfy these requirements. According to the law, the fees are to be used for "department and municipal administration, access, communication, enforcement and education costs for proper mercury-added lamp recycling or disposal."

Since the cost of setting up a collection and recycling program is to a large extent proportional to the number of bulbs sold, the alternative fee structure bases costs on proportional sales. The individual manufacturer's cost for creating and implementing a collection plan for mercury-added bulbs would vary substantially based upon the number of lamps sold by that manufacturer in Massachusetts. A manufacturer selling four million bulbs would incur far greater costs than a manufacturer selling 100, 1000, or even 10,000 lamps.

By paying the registration fee in lieu of setting up their own collection and recycling program, manufacturers with the highest sales of mercury-added lamps will receive a proportionally greater benefit from utilizing the registration fee as an alternative means of compliance with the collection and recycling requirements that are otherwise required by the statute.

9. Comment: (Kohorst and Eaves, supported by Howley, Dolin, Serres)

Assessing fees solely on a manufacturer's proportional share of the total sales of lamps in Massachusetts would create a huge disparity in fees between companies that sell the highest number of mercury-added lamps and those that sell the least number of lamps.

The commenters question the application and relevance of the legal authorities cited by MassDEP for the derivation of the amount of the fees based strictly on a unit sales approach. M.G.L. chapter 21H, §6J(d)(1) does not speak at all to the specific amount of the registration fees paid by individual companies for this program or the methodology for determining individual fees. It only speaks to the aggregate amount of the fee.

Response:
In establishing a fee schedule for the Mercury Management Act annual registration fee, M.G.L. chapter 21H, §6J(d)(1) specifically requires that the fee be adjusted pursuant to M.G.L. Chapter 21A, §18. MassDEP must adhere to the requirements of both statutes. Under MassDEP's fee statute M.G.L. Chapter 21A, §18 and regulations at 310 CMR 4.00, fees are scaled for various classes of permits to account for differences in the level of effort MassDEP must expend on

technical assistance, permit review and ongoing compliance and enforcement activities. In 2013, the last year that sales data was collected by MassDEP, there were 45 manufacturers that, in the aggregate, sold more than 18 million mercury-added lamps in Massachusetts that year. Of this total, four manufacturers accounted for 84% of sales, while the combined sales from the other 41 manufacturers required to report under the Act accounted for only 16% of the total sales. By calculating the dollar amount of each manufacturer's fee directly in proportion to the number of lamps sold by that manufacturer in a given year, the fee will reflect the proportional benefit received by each manufacturer. In addition, as noted above, fees are scaled for various classes of permits to account for differences in the level of effort MassDEP must expend. If there is a large disparity in sales by lamp manufacturers in a given year, this will be reflected in the monetary range of the annual registration fees assessed for that year. If there is little disparity in sales numbers, then the proportional annual fee will also appropriately reflect the market share for each manufacturer in relation to the benefit received.

10. Comment: (Kohorst and Eaves, supported by Howley, Dolin, Serres)

MassDEP's use of the Massachusetts Supreme Court case cited by the DEP, *American Trucking Associations, Inc. et al, v. Sec. of Administration,* 415 Mass. 337 (1993) as a basis for setting a proportional fee schedule is inapposite as well. All manufacturers of fluorescent lamps are equally situated in that they are shipped in from out-of-state. Nor is the registration fee to support the State's "*administration, access, communication, enforcement, and education costs for proper mercury-added lamp recycling or disposal*" a "use fee" that is required to be apportioned in some manner based on actual use, which was the scenario presented in the *Trucking Associations* case.

Response:
In applying the Commerce Clause in *American Trucking Associations, Inc. et al. v. Sec. of Administration*, 415 Mass. 337 (1993), the Supreme Judicial Court held that MassDEP's fees must be based upon some fair approximation of the use or privilege, and must not unduly burden or restrict the ability of manufacturers to do business in Massachusetts. MassDEP's position is that this case is both applicable and relevant to setting fees under the Mercury Management Act. While all manufacturers may currently ship their mercury-added lamps into Massachusetts from out-of-state, this situation could change at any time based on a manufacturer's business decision. Regardless of whether manufacturers operate in state or out of state, Massachusetts cannot unduly burden or restrict the ability of any manufacturers to do business in Massachusetts. As proposed by MassDEP, a proportional annual registration fee provides manufacturers with a level playing field without unduly burdening small businesses or businesses with products that support a specialized or niche market in Massachusetts.

11. Comment: (Kohorst and Eaves, supported by Howley, Dolin, Serres)

While the commenters agree that sales volume should be one of the factors used to determine fee levels, it should not be the only factor. The commenters believe that all suppliers should have credible "skin in the game." The commenters propose a new methodology for calculating individual registration fees that begins by raising the proposed $100 administrative base fee to $1000. When the total initial fee calculation results in payments totaling less than the required

$300,000, all fees would be adjusted by the same factor to make up the difference. Based on 2013 sales data, the largest suppliers would see fees rise from $10,000 to $15,000 while the smallest may see an increase from $1000 to $1500. In both cases, the fee increases by the same proportion while the absolute amounts reflect the relative size of the companies in the market.

Response:
A minimum administrative fee of $100 was used in MassDEP's proposed fee calculation methodology in order to cover the base administrative costs associated with processing annual registration forms. Without this base fee, many of the manufacturers would pay fees well below that amount based solely on their proportional share of sales (using 2013 data). MassDEP believes that the proposed base fee of $1000 is larger than warranted and would disproportionately disadvantage manufacturers selling a small number of specialty lamps. While the fee structure proposed by the commenters would flatten the disparity in cost between the largest and smallest manufacturers, it would disproportionately disadvantage the smaller manufacturers, and consequently provide an unfair advantage to the largest manufacturers benefiting the most from the payment of a fee in lieu of paying the full cost of a collection and recycling program.